

## **Sex Discrimination and Equal Pay Acts - I**

### **THE GENERAL PROVISIONS**

THE main provisions of the Equal Pay Act 1970 and the Sex Discrimination Act 1975 came into force on 29 December 1975. Their chief operation is within the employment field, and here they cover not only sex discrimination (against both men and women) but also discrimination against married persons on the ground of their being married. In other fields (education, housing and the provision of goods and services), sex discrimination alone is covered. The 1975 Act sets up the Equal Opportunities Commission with the function of 'working towards the elimination of such discrimination and promoting equality of opportunity between men and women generally'.

The legislation affects solicitors in various ways additional to their capacity as legal advisers. It affects them as employers, and also as partners in a firm. It may affect them in relation to the administration of clients' property as trustees, executors or managers. It regulates the way they treat their clients. From the point of view of the profession as a whole, it affects training and examinations and the operation of professional bodies.

The first two parts of this article give an outline of the legislation as it applies generally. The concluding part will explain the various aspects that apply particularly to solicitors.

### **Framework of Acts**

The 1970 Act and the 1975 Act can effectively be treated as one Act since their main provisions came into force on the same date (29 December 1975) and the full text of the 1970 Act as amended by the 1975 Act is set out as pt II of Sched 1 to the 1975 Act.

The most important provision of the 1970 Act is s 1, which deals with equality clauses in employment contracts (originally called equal pay clauses). Other sections of the 1970 Act make similar provision in relation to collective agreements, pay structures, wages regulation orders and agricultural wages orders.

The 1975 Act is divided into eight Parts. Part I defines the types of discrimination to which the Act applies. Parts II to IV detail the various discriminatory acts and omissions rendered unlawful by the Act. Part II deals with discrimination in the employment field while pt III deals with education, with goods, facilities and services, and with disposal of premises. Part IV lists other unlawful acts, including the publication of discriminatory advertisements. Part V lists general exceptions saving acts which would otherwise be rendered unlawful. Part VI sets up the Equal Opportunities Commission, pt VII deals with enforcement and pt VIII contains supplemental provisions.

### **Meaning of discrimination**

The 1975 Act outlaws certain types of sex discrimination, marriage discrimination and victimising discrimination. Sex discrimination may be of two kinds: direct and indirect. A person uses direct sex discrimination against a woman if 'on the ground of her sex he treats her less favourably than he treats or would treat a man'. He uses indirect sex discrimination if-

'he applies to her a requirement or condition which he applies or would apply equally to a man but

(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and

(ii) which he cannot show to be desirable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment because she cannot comply with it'.

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The 1975 Act applies in the same way to men as to women, so any reference to discrimination against a woman has to be read as applying also to discrimination against a man. References to women and men include people of any age.

The 1975 Act also deals with discrimination against married persons, but only within the employment field. As with sex discrimination, it distinguishes between direct and indirect marriage discrimination. The Act also deals with discrimination against a person by reason that he has brought proceedings under either of the Acts or taken any similar move against the person inflicting the discrimination.

### **Equality clauses**

Section 1 of the 1970 Act provides that if the terms of a contract under which a person is employed at an establishment in Great Britain do not include an equality clause they are to be deemed to include one. Clearly, this is of far-reaching importance. In relation to a female employee, s 1 defines an equality clause as follows (the term has a corresponding meaning for male employees):

'An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the 'woman's contract'), and has the effect that-

(a) where the woman is employed on like work with a man in the same employment

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term;

(b) where the woman is employed on work rated as equivalent with that of a man in the same employment

(i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term.'

It will be seen that there are two situations dealt with by the equality clause, where the woman is employed on 'like work' with a man and where she is employed on work 'rated as equivalent' with that of a man. The section goes on to explain in detail what these concepts mean. The first is reasonably self evident; the second, it is explained, applies where a work study report has given the two jobs an equal value in terms of the demand made on the worker. Since they modify the terms of the employment contract itself (whether that contract is express or implied), equality clauses give automatic remedies by way of actions for breach of contract.

### **Other discrimination by employers**

While equality clauses are implied under the 1970 Act, other anti-discriminatory provisions binding employers derive from the 1975 Act. This division between the two Acts in the same field is clearly inconvenient, and it would have been better for the 1975 Act to repeal the 1970 Act and enact new comprehensive provisions. This was ruled out because employers had (in theory if not in practice) been grappling with the 1970 provisions for five years in preparation for their coming into force last year and it was thought unhelpful to confront them with provisions looking quite different from those they had grown accustomed to. The 1975 Act therefore contains complicated demarcation provisions. Broadly, it can be said that the 1975 provisions supplement equality clauses and are additional to them. An exception arises under s 6(6) of the 1975 Act, whereby its anti-discrimination provisions do not apply to benefits consisting of the payment of money when the provision of those benefits is regulated by the employee's contract of employment.

Section 6(2) of the 1975 Act makes it unlawful for a person, in the case of an individual employed by him at an establishment in Great Britain, to use sex, marriage, or victimising discrimination-

in the way he affords the individual access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or

by refusing or deliberately omitting to afford the individual access to them, or

by dismissing the individual, or subjecting him or her to any other detriment.

As regards recruitment to employment, s 6(1) of the 1975 Act makes it unlawful for the employer to discriminate

in the arrangements he makes for the purpose of determining who should be offered the employment, or

in the terms on which he offers the employment, or by refusing or deliberately omitting to offer an individual the employment.

Certain exceptions to the employment provisions are dealt with below. The provisions also apply to contract workers.

### **Discrimination by other bodies in employment field**

Part II of the 1975 Act goes on to enact similar provisions in relation to partnerships, trade unions, qualifying bodies, vocational training bodies and employment agencies. Since these

affect solicitors and the legal profession particularly closely, they will be described in the concluding part of this article.

### **Discrimination in the education field**

Part III of the 1975 Act adopts a two pronged approach in the education field. First, as with all the other anti-discrimination provisions in the Act, it uses the concept of the 'unlawful' act or omission (following the precedent set by the Race Relations Act 1968). But, in the public sector of education alone, it also gives enforcement powers to the Secretary of State for Education and Science. The Act covers the entire range of functions of local education authorities and also covers universities, public schools and other independent schools. Provision is made for polytechnics and certain other educational establishments to be brought within the net by orders made by the Secretary of State for Education and Science. Exceptions for single sex establishments are described below.

The anti discrimination provisions in pt III of the 1975 Act are limited to pupils and would-be pupils. Teachers and other staff are covered by the employment provisions in pt II. Section 22 of the Act makes it unlawful for the responsible body in charge of an educational establishment to discriminate against an individual-

in the terms on which it offers to admit the individual to the establishment as a pupil,  
or

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by refusing or deliberately omitting to accept an application for the admission of the individual to the establishment as a pupil, or

where the individual is a pupil of the establishment-

(i) in the way it affords the individual access to any benefits, facilities or services, or by refusing or deliberately omitting to afford him or her access to them, or

(ii) by excluding the individual from the establishment or subjecting him or her to any other detriment.

### **Goods, facilities and services**

Section 29 of the 1975 Act makes it unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to use sex discrimination against an individual seeking to obtain or use them. While most of the provisions of the 1975 Act are drafted on original lines, this follows closely the corresponding provision of the Race Relations Act 1968 (s 2). Thus the unlawful act consists in-

refusing or deliberately omitting to provide the individual with what he or she is seeking to obtain, or

refusing or deliberately omitting to provide goods, facilities or services 'of the like quality, in the like manner and on the like terms' as are normal in his case in relation to individuals of the opposite sex.

The section contains a list of examples of the facilities and services which are subject to the control. This reproduces almost word for word the list in s 2 of the Race Relations Act 1968. It includes 'the services of any profession', and this is interesting in view of the comment by

Caulfield J in the recent case of *Morris v Duke-Cohan & Co* (1975) 119 SI 826. The learned judge apparently said that where a husband and wife were both clients of the same solicitor 'the solicitor should not have taken instructions from her when the husband was available, for a sensible wife did not generally make major decisions'. This judgment was delivered after royal assent had been given to the 1975 Act, but it seems clear that it runs contrary to s 29. A solicitor who made a practice of treating wives in the manner suggested by the learned judge would be acting unlawfully. It would be different where the treatment accorded with specific directions given by the client.

The 1975 Act goes into no further detail about the nature of discriminatory acts in relation to goods, facilities or services, except that it does contain the following interesting provision (to which there is no counterpart in the Race Relations Act 1968)-

'For the avoidance of doubt it is hereby declared that where a particular skill is commonly exercised in a different way for men and for women it does not contravene subsection (1) for a person who does not normally exercise it for women to insist on exercising it for a woman only in accordance with his normal practice or, if he reasonably considers it impracticable to do that in her case, to refuse or deliberately omit to exercise it' (s 29 (3)).

What Parliament had in mind here was the case of someone like a hairdresser or tailor whose techniques are different for men and for women. In the hairdressing field this is less common than it was, and even in tailoring the 'unisex' phenomenon is increasingly prevalent. Nevertheless an old fashioned men's bespoke tailor will be saved by this provision from acquiring the new arts necessary for making ladies' skirts if he reasonably considers it impracticable to do so. If, however, the lady insists on having a man's suit made for her, or the tailor could with a little ingenuity manage to make a skirt, he will be obliged to do so.

### **Disposal or management of premises**

Section 30(1) of the 1975 Act bites on a person having 'power to dispose' of any premises in Great Britain. It is unlawful for him to use sex discrimination against an individual in the terms on which the premises are offered, or by refusing an application for the premises. Discriminatory treatment of applicants in relation to housing lists is also made unlawful.

Section 30(2) deals with discrimination against persons already occupying premises. They must not be evicted, or subjected to any other detriment, or denied access to benefits or facilities, on discriminatory grounds. Where a landlord's consent is needed for assignment of a lease, it is unlawful to withhold the consent on discriminatory grounds (s 31).

F A R BENNION,  
*Draftsman of the Sex Discrimination Act 1975*

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